In the
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76-1690

DR. H. W. [redacted], et al.,

Appellants,

v.

[redacted], etc., et al.,

Appellees.

[redacted]
[redacted]
[redacted]
[redacted]

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76-1690

DR. H. W. BERRY, M. C. BLOUNT, ISAAC J. CHUMBLY and JULIAN C. SIMMONS, individually and on behalf of all those similarly situated,

Appellants

v.

J. D. DOLES, individually and in his capacity as Chairman of the Peach County Board of Commissioners of Roads and Revenues; H. W. PEAVY, JR. and EDWARD C. WOODWARD, individually and in their capacity as members of the Peach County Board of Commissioners of Roads and Revenues; and JULIAN F. JONES, individually and in his capacity as Judge of the Probate Court of Peach County,

Appellees

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment of the District Court be affirmed on the following grounds:

1. The decision of the District Court is so obviously correct under the principles established in Beer v. United States, 425 U.S. 130 (1976), as to warrant no further review by this Court.

2. The District Court did not abuse its discretion in failing to set aside the elections held in 1976 or shorten the terms of the County Commissioners.

OPINION BELOW

The opinion and order of the District Court are set forth in the Appendix of appellants' jurisdictional statement.

JURISDICTION

The jurisdictional requisites are adequately set forth in the appellants' jurisdictional statement.

QUESTION PRESENTED

Whether the three-Judge District Court erred in refusing to grant an injunction whereby the elections conducted in 1976 would be set aside and the terms of the persons elected shortened to two years.

STATUTES INVOLVED

Pertinent portions of the Act of the General Assembly of Georgia creating the Board of Commissioners of Peach County and the amendment thereto are set forth in the Appendix of appellants' jurisdictional statement.

STATEMENT

Appellees do not take issue with the statement of the case as set forth in appellants' jurisdictional statement.

ARGUMENT

I.

Prior to 1964, Peach County, Georgia was governed by one commissioner who held this position by virtue of having been elected Judge of the Court of Ordinary. Ga. Laws, 1939, p. 703.

In 1964, the General Assembly of Georgia passed another local act dealing with Peach County which created a three-man commission to govern county affairs. This Act provides for three commissioners who must live in districts but who are elected on a county-wide basis for four-year terms. The Act was conditioned on a referendum which was approved on April 29, 1964, and the first elections under this Act were held in 1964. Section 13 of this Act specifically repealed the 1939 legislation.

Thereafter in 1968 the General Assembly enacted another bill dealing with Peach County which inserted a new Section 2A in the 1964 Act. This amendment provided that the candidate elected to Post 3 would serve a two-year term instead of the usual four years, and that thereafter his successor would be elected to a four-year term of office. The amendment thus had the effect of providing continuity of board membership by staggering the terms of the three commissioners.

In the District Court appellees conceded that the 1968 amendment was subject to Section 5 of the Voting Rights Act of 1965 and that it could not be used in any future elections unless and until it is cleared under one of the procedures provided by the Act.

As to the question of any further relief, appellants have requested at various stages of the case that the 1976 elections be enjoined, that the elections be set aside, and that the terms of the two commissioners elected in 1976 be shortened to two years. The District Court correctly refused any such relief.

Posts 1 and 2 which were created by the 1964 Act of the General Assembly pre-date the Voting Rights Act of 1965 and were not mentioned, re-enacted or affected in any manner whatsoever by the 1968 Amendment. These posts are therefore carried forward without the necessity of being subjected to the pre-clearance requirements of the Voting

Rights Act. Beer v. United States, 425 U.S. 130 (1976); Pitts v. Cates, 536 F.2d 56 (5 Cir. 1976). Only Posts 1 and 2 were open for contest in the 1976 elections which appellants seek to have set aside. There was no contested election for Post 3 in the August and November elections of 1976. Therefore, there was no election to enjoin, and likewise there is no election which could subsequently be set aside.

II.

Even assuming that the District Court had the power to enjoin or set aside the 1976 elections, it did not abuse its discretion in refusing to do so.

This Court has addressed the question of relief in a Section 5 case in Allen v. State Board of Elections, 393 U.S. 544 (1969), and Perkins v. Matthews, 400 U.S. 379 (1971), and has established several factors which should be considered by the lower courts in determining the appropriate remedy:

a. Was the change so clearly covered by § 5 that the failure to submit it constituted deliberate defiance of the Act? Allen, 393 U.S. at 572.

b. The nature of the changes complained of. Perkins, 400 U.S. at 396.

c. Has a discriminatory purpose or effect been determined by any court? Allen, 398 U.S. at 572.

d. Was it reasonably clear at the time of the election that the changes were covered by § 5? Perkins, 400 U.S. at 396.

When considered in light of these factors, the balance of the equities clearly lies in appellees' favor.

The 1968 Amendment effected a technical change in the county's election law to provide for continuity of board membership. Although this Court has clearly established in Allen and subsequent cases that the district court cannot consider whether the change is potentially discriminatory, it has just as clearly said that the "nature of the change" should be considered, thereby implying that some changes may be more significant than others. This case deals with the tenuous proposition that votes were diluted because the terms of the three commissioners were staggered and not with such things as the right of Negro citizens to be candidates, Hadnott v. Amos, 394 U.S. 358 (1969), or irregularities on election day which restrict the right to cast a ballot, Bell v. Southwell, 376 F.2d 659 (5 Cir. 1967).

There has been no finding or determination the District Court that the change in issue has any discriminatory purpose or effect. Moreover, this change is only one small part of this case when viewed in its overall context. Count I of the Complaint which is still pending before the District Court is a frontal attack on all facets of the county's election law based on the theory that at-large elections dilute the potential voting strength of minorities.

The change in question here was enacted in 1968 prior to this Court's decisions in Allen and Perkins. It was used in the elections of 1968, 1970 and 1974 without objection or question from any quarter. This suit was filed four days before the primary held on August 10, 1976. Appellants contend that it was reasonably clear in 1976 that this change was covered; however, no court as of yet has so held as they admitted in their briefs filed below. Even assuming a reasonable person familiar with this Court's decisions construing the provisions of the Voting Rights Act might have suspected it would be covered, there is no evidence of any deliberate defiance.

What is reasonably clear in this case, however, is that the appellants have not been diligent. In reality they are asking this Court to order the District Court to set aside an election conducted in 1974 pursuant to a statute enacted in 1968 by means of a lawsuit filed four days before the primary in 1976. Appellees are not aware of any cases which have sanctioned such a radical result.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the District Court.

Respectfully submitted,

WALLACE MILLER, JR.

500 First National
Bank Building
Macon, Georgia 31201

SAMPSON M. CULPEPPER

206 Central Avenue
Fort Valley,
Georgia 31030

Attorneys for Appellees